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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-5515

JAMES AMBROSE BROWN,

Petitioner,

v.

JAMES P. MITCHELL, SUPERINTENDENT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION ~~TO GRANTING OF WRIT OF~~ CERTIORARI

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PRELIMINARY STATEMENT

The respondent, James P. Mitchell, Superintendent, Virginia State Penitentiary, respectfully prays that a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit of May 9, 1979, not be granted.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 598 F.2d 835 (4th Cir. 1979) and is attached to the Petition as Appendix A. The Memorandum Order of the District Court is unreported but is attached to the Petition as Exhibit C.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Court of Appeals was correct in holding that United States v. Mauro established new law that a state writ of habeas corpus ad prosequendum filed after the lodging of a detainer is a written request for temporary custody within the meaning of Article IV(e) of the Interstate Agreement on Detainers and in utilizing Linkletter v. Walker in holding Mauro nonretroactive.

STATUTES INVOLVED

The relevant statutes are set forth in the Petition at pages 3-4.

STATEMENT OF THE CASE

Petitioner was tried by a jury on February 3, 1977, in the Circuit Court of Westmoreland County, Virginia, wherein he was convicted of first degree murder and was sentenced to serve a term of twenty (20) years in the Virginia State Penitentiary.

Prior to trial on the merits, petitioner filed a Motion to Dismiss Indictment with Prejudice on the ground that he was being tried in violation of Article IV(e) of the Interstate Agreement on Detainers (Agreement). The motion was denied by the trial court. The grounds stated for the motion were that the Commonwealth had obtained custody of petitioner from federal custody in October, 1976, pursuant to a writ of habeas corpus ad prosequendum after a detainer had been lodged against petitioner by Westmoreland

County, Virginia, and that petitioner had been returned to federal custody without being tried.

From his conviction petitioner filed a petition for appeal with the Supreme Court of Virginia and asserted, among other assignments of error, that the motion to dismiss pursuant to Article IV(e) of the Agreement had been erroneously denied in that the Commonwealth of Virginia had obtained custody of him on October 28, 1976, and had returned him to federal custody without trying him.

After considering the Commonwealth's brief in opposition, the Virginia Supreme Court rejected the petition for appeal and affirmed the judgment below by order of August 10, 1977.

Petitioner subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, in which he asserted that he was transferred three times from federal custody to state custody while having a state detainer lodged against him (October 28, 1976; January 18, 1977; February 3, 1977); and that therefore his trial on February 3, 1977, was in violation of Article IV(e) of the Agreement. The District Court denied the petition for a writ of habeas corpus by Memorandum Order dated July 20, 1978, finding that petitioner had been obtained in October, 1976, by writ of habeas corpus ad prosequendum and not pursuant to the Agreement; that when custody of petitioner was obtained in October, 1976, the custody was pre-indictment and there were no pending criminal charges against him as required for applicability of the Agreement; that custody of petitioner was obtained in January, 1977, pursuant to petitioner's request for psychiatric

evaluation for his benefit, not for trial purposes, so that the Agreement did not apply to such appearance; and that petitioner's custody on February 3, 1977, was for trial purposes and that he was immediately tried.

A certificate of probable cause for appeal was granted petitioner by the Court of Appeals on October 3, 1978. In the Court of Appeals petitioner contended that the District Court was wrong in holding that the petitioner's October, 1976, transfer pursuant to a writ of habeas corpus ad prosequendum was not a transfer pursuant to the Agreement. Petitioner relied on United States v. Mauro and United States v. Ford, 436 U.S. 340 (1978), decided after the petitioner's conviction was final. Petitioner contended further that the District Court was wrong in holding that petitioner's pre-indictment transfer in October, 1976, was not within the scope of the Agreement inasmuch as there was, at the time of the transfer, no pending criminal charge. Petitioner contended further that United States v. Mauro, supra and United States v. Ford, supra, controlled disposition of his case but also asserted that Mauro and Ford did not constitute a new rule of law, but that even if they did, the rule should be applied retroactively so as to govern his case.

The Court of Appeals held that under Mauro the Commonwealth of Virginia had tried petitioner in violation of Article IV(e) of the Agreement. The Court of Appeals further held Mauro to be new law and that it would be nonretroactive applying the controlling test of Linkletter v. Walker, 381 U.S. 618 (1965) and Stovall v. Denno, 388 U.S. 293 (1967).

On petition for rehearing filed with the Court of Appeals petitioner again contended that Mauro did not constitute new

law, alleging that the Court of Appeals was in error for not distinguishing between cases involving state writs of habeas corpus ad prosequendum and those involving federal writs of habeas corpus ad prosequendum. The petition for rehearing was denied by the Court of Appeals by order dated May 31, 1979.

STATEMENT OF FACTS

Petitioner was in federal custody in the District of Columbia when a detainer was filed against him in March, 1976, based upon charges in Westmoreland County, Virginia. He was convicted on charges in the District of Columbia in July, 1976.

On October 21, 1976, the prosecutor for Westmoreland County secured a writ of habeas corpus ad prosequendum to secure the attendance of petitioner before the grand jury. The writ was executed on October 28, 1976, on which day petitioner was indicted and arraigned. Counsel was appointed and trial set for December 22, 1976. Petitioner was returned to federal custody.

On November 23, 1976, the Circuit Court of Westmoreland County granted petitioner's request for a psychiatric examination and on December 20, 1976, the court granted petitioner's motion for a continuance, setting trial for February 3, 1977.

On January 10, 1977, the prosecutor secured a writ of habeas corpus ad prosequendum in order to make petitioner available for psychiatric examination as requested and arranged by petitioner's counsel. The writ was executed on January 18, 1977. Following such examination petitioner was returned to federal custody.

On January 19, 1977, the prosecutor secured a writ of habeas corpus ad prosequendum to obtain petitioner's presence

for trial. The writ was executed on February 3, 1977, and petitioner was tried the same day.

ARGUMENT AGAINST GRANTING CERTIORARI

The Court of Appeals was correct in holding that United States v. Mauro established new law that a state writ of habeas corpus filed after the lodging of a detainer is a written request for temporary custody within the meaning of Article IV(e) of the Interstate Agreement on Detainers and in utilizing Linkletter v. Walker in holding Mauro nonretroactive.

The petitioner urges two reasons for granting the writ of certiorari. The first is that the rule that a state writ of habeas corpus ad prosequendum is a written request for custody within the meaning of Article IV(e) of the Agreement is not dependent on Mauro. Or, in other words, that while Mauro represents new law as to federal writs of habeas corpus ad prosequendum, it does not represent new law as to state writs of habeas corpus ad prosequendum. The significance of this contention is, of course, that if the Mauro law as to state writs is not new, then petitioner would have the benefit of "automatic retroactivity."

The second reason petitioner urges for granting the writ is that not only did the Court of Appeals erroneously find that Mauro represents new law as to state writs of habeas corpus ad prosequendum, but also that, even assuming that Mauro does represent such new law, the Court of Appeals should have applied Robinson v. Neil, 409 U.S. 505 (1973) in determining retroactivity instead of Linkletter v. Walker, supra.

Respondent submits that the Court of Appeals was correct in finding that Mauro represents new law as to all writs of habeas corpus ad prosequendum, and that under Linkletter-Stovall analysis, such new law is nonretroactive and thus petitioner was entitled

to no relief.

The respondent would point out that until petition for rehearing to the Court of Appeals, petitioner relied on Mauro for his argument that the state writs of habeas corpus ad prosequendum utilized in his case were written requests for temporary custody under the agreement. Only upon petition for rehearing did petitioner assert, as now, that Mauro applies only to federal writs of habeas corpus ad prosequendum.

Petitioner contends that Mauro is not new law, asserting that the decision did not overrule past decisions or decide an issue of first impression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Husen, 404 U.S. 97 (1971). The respondent would point out that this court does not have to overrule prior cases in order to render a new law. See United States v. Bowen, 500 F.2d 960, 975-976 (9th Cir. 1974). Because of the nature of the judicial process and of the lengthy period of time necessary to produce a dispositive interpretation of the law, practice and procedure often develop based on what appears to be the law at the time of the origination of such practice and procedure.

The practice in question in the instant case is the use of a writ of habeas corpus ad prosequendum to secure temporary custody of a prisoner in another jurisdiction for a criminal trial. The use of such writ by states for such purpose has been honored by the federal authorities as a matter of policy. See United States ex.rel. Esola v. Groomes, 520 F.2d 830, 836 n. 18 (3rd Cir. 1975). Prior to the Mauro decision, it was never clearly resolved as to whether the Agreement was the exclusive means of securing temporary custody of a prisoner in another jurisdiction.

The Court of Appeals examined the Chevron Oil Co. criteria and determined that Mauro did establish a new principle of law:

> Prior to Mauro, three of the five courts of appeals that had considered the issue held that transfers pursuant to writs of habeas corpus ad prosequendum were not subject to the Interstate Agreement on Detainers. See Ridgeway v. United States, 558 F.2d 357 (6th Cir. 1977) [cert. denied, 436 U.S. 946 (1978)]; United States v. Kenaan, 557 F.2d 912 (1st Cir. 1977) [cert. denied, 436 U.S. 943 (1978)]; United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977) [cert. denied, 436 U.S. 943 (1978)]. The two courts of appeals which had found that the Agreement established rights of prisoners when the writ was utilized did so only over vigorous dissents. See United States v. Sorrell, 562 F.2d 227 (3d Cir. 1977) (en banc) [cert. denied, 436 U.S. 949 (1978)], (dissenting opinion of Weis, J., for himself and two other judges, and dissenting opinion of Garth, J., both appended to companion case of United States v. Thompson, 562 F.2d 232, 235-46 [3d Cir. 1977] [cert. denied, 436 U.S. 943 (1978)]); United States v. Ford, 550 F.2d [732] at 744-45 [(2nd Cir. 1977)] (Moore, J., dissenting); United States v. Mauro, 544 F.2d [588] at 595-97 [(2nd Cir. 1976)] (Mansfield, J., dissenting).
>
> With the exception of the Second Circuit's holding in Ford, none of these decisions attributed dispositive significance to the presence or absence of a detainer. In addition, the Second Circuit's holdings in Mauro and Ford did not apply to situations in which temporary custody was obtained for arraignment and the prisoner was promptly returned. See United States v. Chico, 558 F.2d 1047 (2nd Cir. 1977) [cert. denied, 436 U.S. 947 (1978)]. The Third Circuit's holding in Sorrell apparently applies only to writs issued after the date of that decision. United States v. Boyd, 437 F.Supp. 519 (W.D. Pa. 1977), aff'd without opinion, 578 F.2d 1376 (3d Cir. 1978).

598 F.2d at 838

The Court of Appeals therefore concluded that Mauro authoritatively established a principle of law which "was not clearly foreshadowed." See Chevron Oil, 404 U.S. at 106.

The petitioner makes much of the fact that Mauro dealt with federal, not state, writs of habeas corpus ad prosequendum.

Respondent submits that the distinction drawn between the two is nebulous. While the particular writ of habeas corpus ad prosequendum at issue in Mauro was indeed a federal one, the holding is equally applicable to, and equally new law as to, state writs. (Petitioner does not contend that Mauro is not new law as to federal writs).

Assuming that Mauro is new law, petitioner apparently contends that the Court of Appeals should have applied Robinson v. Neil, supra, to determine its retroactivity instead of applying Linkletter v. Walker, supra, and Stovall v. Denno, supra. The petitioner apparently urges that the Court of Appeals erroneously construed Robinson as applying to cases involving "significantly different" constitutional policies (such as the guarantee against double jeopardy at issue in Robinson), as opposed to construing Robinson as applying to all rulings aimed at preventing a trial from taking place. (The petitioner does not contend that the rights recognized in Mauro are constitutionally protected.) The significance of such argument is that if the Court of Appeals had applied Robinson, a finding of retroactivity of Mauro would have been more likely.

The respondent would point out that, assuming that the Court of Appeals was correct in utilizing Linkletter instead of Robinson, petitioner does not challenge the Court of Appeals' Linkletter result of nonretroactivity on its merits. The petitioner challenges the Court of Appeals' nonretroactivity holding solely on the basis that Robinson was not applied.

The respondent submits that the applicable test was Linkletter. The very reason for this Court's different rule in Robinson was that the double jeopardy claim was significantly different from other constitutional procedural guarantees. 409 U.S. at

508-509. The Robinson analysis is an exception to the generally accepted approach to retroactivity. Subsequent cases by this Court involving retroactivity of criminally related matters indicate that the generally applicable test for retroactivity is the Linkletter analysis not the Robinson analysis. See United States v. Peltier, 422 U.S. 531 (1975); Bowen v. United States, 422 U.S. 916 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975); Hankerson v. North Carolina, 432 U.S. 233 (1977); Michigan v. Payne, 412 U.S. 47 (1973). See, also, United States v. Bowen, supra, where the Ninth Circuit Court of Appeals construed the Robinson analysis as an exception, rather than the rule. 500 F.2d at 979. Furthermore, the respondent contends that the instant case should not have been reviewed under the Robinson analysis since the instant case does not involve any constitutional guarantee which is as important and weighty as the privilege against double jeopardy. What is involved in this case is a federal statutory right which is not constitutionally compelled. It would have been unreasonable to have applied the Robinson approach to the instant case when this Court in other cases has applied the Linkletter analysis to constitutional rights more firmly entrenched than the statutory right under the Agreement.

The Court of Appeals did not misapply Linkletter and the Court of Appeals properly distinguished Robinson.

CONCLUSION

The Court of Appeals for the Fourth Circuit has decided the issues herein in ways which are in accord with the applicable decisions of this Court. Although this Court has broad statutory authority to review petitions for writs of certiorari a petition

will be granted only when there are special and important reasons therefor. Rule 19, Rules of the Supreme Court of the United States.

For the reasons presented, the respondent respectfully submits that the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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